No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP, ET AL.,

Petitioners,

v.

STATE OF HAWAII, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE RETIRED GENERALS AND ADMIRALS OF THE U.S. ARMED FORCES IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST

Amici curiae are flag officers—those holding the rank of brigadier general or rear admiral, or higher—of the United States Armed Forces.[1] They include officers who have served in senior command positions during war and as senior judge advocates general. Amici know matters of war and national security. Collectively, they served for over 800 years in locations all around the world. Amici have an interest in ensuring that national security policies pursued by the United States conform to the rule of law, and in protecting the safety of American service members and citizens.

This case tests the legal and constitutional validity of Proclamation No. 9,645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) ("EO-3"). EO-3 indefinitely suspends entry of nationals from six Muslim-majority countries based on nationality, as well as North Koreans and Venezuelan government officials, with some exemptions. EO-3 also imposes heightened security screening requirements for non-immigrant and immigrant entry of nationals from the Muslim-majority nation of Iraq. EO-3 and its predecessors have stained the reputation of the United States by creating the impression that the United States embraces an anti-Muslim policy agenda. The purpose

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[1] Petitioners' blanket consent to filing of amicus briefs is on file with the clerk of the Court, and Respondents have consented in writing to the filing of this brief. No counsel for any party has authored this brief in whole or in part. No party or counsel for a party, nor any other person besides amici or their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

of this brief is to explain to the Court how EO-3 harms the national security interests of the United States by needlessly undermining the cooperation between U.S. troops and our local allies.

Amici curiae are as follows:

General Charles Krulak, USMC (Ret.), served 35 years in the Marine Corps and was the Corps' 31st Commandant.

General Merrill A. McPeak, USAF (Ret.), served 37 years in the Air Force. He was the 14th Chief of Staff of the Air Force.

Admiral John B. Nathman, USN (Ret.), served 37 years in the Navy. He held positions including Vice Chief of Naval Operations, Commander of U.S. Fleet Forces Command, and Deputy Chief of Naval Operations for Warfare Requirements and Programs.

General Johnnie E. Wilson, USA (Ret.), served 38 years in the Army. He held positions including Commanding General of the U.S. Army Materiel Command, Chief of Ordnance for the U.S. Army Ordnance Corps, and Commander of the U.S. Army Ordnance Center and School.

Lieutenant General Robert G. Gard Jr., USA (Ret.), served 31 years in the Army, holding positions including Assistant to the Secretary of Defense and President of the National Defense University. He is a member of the National Advisory Board at the Center for Arms Control and Non-Proliferation.

Vice Admiral Kevin P. Green, USN (Ret.), served more than 30 years as a naval officer. He retired as Deputy Chief of Naval Operations for Operations, Plans, and Policy.

Vice Admiral Lee F. Gunn, USN (Ret.), served 35 years in the Navy. He served as Inspector General of the Department of the Navy. He previously served as Deputy Task Force Commander of Combined Task Force United Shield, which was responsible for the withdrawal of U.N. peacekeeping forces from Somalia.

Lieutenant General Claudia J. Kennedy, USA (Ret.), served 31 years in the Army, holding positions including Deputy Chief of Staff of Intelligence. The first woman in the Army to reach the three-star rank, she is a member of the Military Intelligence Hall of Fame.

Lieutenant General Charles Otstott, USA (Ret.), served more than 30 years in the Army. He held positions including Deputy Chairman of the NATO Military Committee and Commander of the 25th Infantry Division (Light). He served two combat tours in Vietnam.

Lieutenant General Norman R. Seip, USAF (Ret.), served 35 years in the Air Force. A command pilot with more than 4,500 flying hours, he retired as commander of the 12th Air Force, where he commanded over 400 aircraft and more than 33,000 active-duty military and civilian personnel.

Rear Admiral Don Guter, JAGC, USN (Ret.), served 32 years in the Navy. He retired as the Judge Advocate General for the Navy. He is President and Dean of the South Texas College of Law, Houston.

Rear Admiral John D. Hutson, JAGC, USN (Ret.), served 28 years in the Navy. He served as the Judge Advocate General of the Navy. He is the former Dean and President of the University of New Hampshire School of Law.

Major General Michael R. Lehnert, USMC (Ret.), served 36 years in the Marine Corps. He held positions including Commanding General of the U.S. Marine Corps Installations West, Commander of Marine Logistics Command for Operation Iraqi Freedom, and Chief of Staff of U.S. Southern Command.

Major General William L. Nash, USA (Ret.), served 34 years in the Army. He commanded the First Armored Division, leading the multinational task force organized to implement the Dayton Peace Accords in northeastern Bosnia-Herzegovina.

Major General William D. Razz Waff, USA (Ret.), served more than 39 years in the Army. He held positions including Commanding General of the 99th Regional Support Command, Commander of the 1485th Logistics Support Battalion and Director of the Simulations Branch (Battle Projection Group, 1st Brigade, 85th Division).

Major General Antonio M. Taguba, USA (Ret.), served 34 years in the Army. He held positions including Deputy Commanding General for Support of the 3rd Army, U.S. Army Forces Central Command and Deputy Assistant Secretary of Defense for Reserve Affairs.

Major General Margaret Woodward, USAF (Ret.), served 32 years in the Air Force, having flown in nineteen named operations. The first woman in Air Force history to command the Combined Forces Air Component, she commanded the 17th Air Force during the 2011 military intervention in Libya.

Rear Admiral James A. "Jamie" Barnett, USN (Ret.), served more than 30 years in the Navy. Focusing much of his naval career on the Middle

East and Africa, he served as executive officer of the Military Sealift Command Office in Saudi Arabia during Operation Desert Shield/Desert Storm, and he commanded military sealift command units in the Persian Gulf.

Brigadier General David M. Brahms, USMC (Ret.), served 25 years in the Marine Corps. He retired as the Senior Legal Adviser for the Marine Corps. He is a member of the Board of Directors of the Judge Advocates Association.

Brigadier General Stephen A. Cheney, USMC (Ret.), served more than 30 years in the Marine Corps. He held positions including Inspector General of the Marine Corps and served as a member of the Department of State's International Security Advisory Board.

Brigadier General John W. Douglass, USAF (Ret.), served 29 years in the Air Force. He held positions including Director of Defense Programs on the National Security Council and Deputy U.S. Military Representative to the NATO Military Committee.

Brigadier General Leif H. Hendrickson, USMC (Ret.), served 30 years in the Marine Corps. He held positions including Commanding General of Marine Corps Base, Quantico, President of Marine Corps University, and Commanding General of Education Command.

Brigadier General David R. Irvine, USA (Ret.), served 40 years in the Army. He held positions as a strategic intelligence officer, Deputy Commander for the 96th Regional Readiness Command, and faculty member of the Sixth U.S. Army Intelligence School, where he taught military law for 18 years.

Brigadier General Richard O'Meara, USA (Ret.), served 35 years in the Army. He is a combat veteran of Vietnam, serving in the Judge Advocate General's Corps. He is the Director of the Division of Global Affairs at Rutgers University.

Brigadier General Murray G. Sagsveen, USA (Ret.), served more than 24 years in the Army. He retired as the Army National Guard's Special Assistant to the Judge Advocate General of the Army. He previously served in infantry and military intelligence positions in Korea, and in the North Dakota Army National Guard.

Brigadier General Stephen N. Xenakis, USA (Ret.), served 28 years in the Army as a Medical Corps officer. He held assignments as a clinical psychiatrist, staff officer, and senior commander, including Commanding General of the Southeast Army Regional Medical Command.

SUMMARY OF ARGUMENT

EO-3 imposes a counterproductive and dangerous travel ban. EO-3 indefinitely bans the entry of nationals from six Muslim-majority countries on the basis of a "national security" rationale that fails to support EO-3. Rather, EO-3 threatens U.S. national security by complicating the strategic mission of our troops deployed around the world. Because it encourages the perception that the United States is pursuing an anti-Muslim foreign policy, EO-3 jeopardizes the stability of the support that the United States receives from its allies, erodes essential goodwill, makes it more difficult for the United States to win hearts and minds abroad, and otherwise undermines the ability of the United

States to pursue strategic partnerships and objectives.

Regardless of the intentions behind EO-3, it is perceived domestically and abroad as a "Muslim ban," fueling the perception that the United States is at war with Islam. Moreover, EO-3 creates the perception that the United States will violate international norms and the humanitarian ideals upon which our nation was founded to fulfill the discriminatory policy goals of a new administration. This delegitimizes U.S. global efforts to support these norms and encourages enemy forces to violate international norms, which, in turn, may adversely affect U.S. troops in the theater. The perception of anti-Muslim animus behind the ban also fuels the propaganda narrative spread by terrorists and others who seek to harm U.S. interests. Because it undermines, rather than advances, national security, the ban fails to satisfy its only stated rationale.

ARGUMENT

I. The Perception that EO-3 Expresses Anti-Muslim Bias Compromises Our Military Objectives.

A. EO-3 Is Reasonably Perceived as Hostile to Muslims and Muslim-Majority Countries.

The content of EO-3, viewed in light of statements by the administration, conveys remarkable and unabashed hostility toward Muslims and Muslim-majority countries.[2] Irrespective of the President's

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[2] *See, e.g.*, FAIZA PATEL & RACHEL LEVINSON-WALDMAN, THE ISLAMOPHOBIC ADMINISTRATION (Brennan Center for Justice, 2017), https://goo.gl/ERcufs.

intent in issuing this Proclamation, there are ample reasons why domestic and international audiences perceive the Order as unlawful and discriminatory in its intent. This perception threatens the security interests of the United States and its military mission.

Anti-Muslim rhetoric by Donald Trump prior to his inauguration as President—including a promise to impose a "total and complete shutdown" of immigration by Muslims—was internationally reported at the time of the statements[3] and was described or quoted in international reporting surrounding EO-3 and its two predecessors, Executive Order No. 13,769, 82 Fed. Reg. 8,977 (Jan. 27, 2017) ("EO-1"), and Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2").[4] Indeed, one of the President's advisors at the time EO-1 was adopted stated publicly that President Trump

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[3] *See, e.g.*, *Donald Trump Urges Ban on Muslims Coming to US*, BBC NEWS (Dec. 8, 2015), https://goo.gl/jEvfZJ ("In a campaign statement, [Trump] said a 'total and complete' shutdown [of Muslims to the United States] should remain until the US authorities 'can figure out' Muslim attitudes to the US."); Gilles Paris, *Donald Trump Veut Stopper « l'Immigration Musulmane » aux Etats-Unis*, LE MONDE (Dec. 8, 2015), https://goo.gl/YQDvoa; AFP, *Trump Unveils First TV Campaign Ad, Urges Ban on Muslims*, EXPRESS TRIBUNE (Jan. 5, 2016), https://goo.gl/jhZCvy (AFP article reported by Pakistani newspaper).

[4] *See, e.g.*, Alec Scott, *"We Call It the Muslim Ban 3.0": The Young Yale Lawyers Fighting Trump's Order*, GUARDIAN (Oct. 24, 2017), https://goo.gl/47xws9 ("On 27 January, Donald Trump issued an executive order. It began his attempt to fulfill a key campaign promise: a 'total and complete shutdown of Muslims entering the US.' ").

requested a ban on entry by Muslims and that EO-1 was intended as a way of implementing such a ban.[5]

Public statements by administration officials suggesting that the travel order was intended as a Muslim ban did not stop when EO-1 was replaced by EO-2 in March 2017 or EO-3 in September 2017. For example, in November 2017, a White House deputy press secretary defended the President's retweeting of anti-Muslim propaganda videos as consistent with the President's national security priorities, reflected in the President's "travel order"—which, at that time, was EO-3.[6] As recently as March 6, 2018, a former Trump policy advisor described the President's orders as a "Muslim ban" in extensively reported interviews on CNN.[7]

EO-3 on its face establishes a connection to the prior travel bans, by repeatedly citing EO-2 as the reason for the new ban. The U.S. Government's brief

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[5] Amy B. Wang, *Trump Asked for a "Muslim Ban," Giuliani Says—and Ordered a Commission to Do It "Legally,"* WASH. POST (Jan. 29, 2017), https://goo.gl/NDsg4f ("So when [Trump] first announced it, he said, 'Muslim ban.' He called me up. He said, 'Put a commission together. Show me the right way to do it legally.' ").

[6] *See* Kathryn Watson, *White House Defends Trump's Muslim Tweet by Mentioning Travel Ban*, CBS NEWS (Nov. 29, 2017), https://goo.gl/kbZ9gp ("White House deputy press secretary Raj Shah on Wednesday defended the President's decision to retweet anti-Muslim videos from a far-right British account by saying the President has consistently prioritized national security, including through his travel order.").

[7] Chris Cilizza, *The 42 Craziest Quotes from Sam Nunberg's Absolutely Bonkers CNN Interviews*, CNN (Mar. 6, 2018), https://goo.gl/aDhiHV ("I came up with the Muslim ban.").

also makes clear that EO-3 is based on the earlier orders.[8] The President himself has repeatedly outlined the relationship between the orders, on one occasion describing EO-2 as a "watered down" version of the "original Travel Ban"[9] and on another occasion stating that EO-2 was effectively the same as EO-1.[10] His aides, as well, emphasized that any revised travel ban would have "the same basic policy outcome" as the first.[11] All these statements create

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[8] *See, e.g.*, Pet'rs' Br. 4 (EO-2 issued to "[r]espond[] to the Ninth Circuit's decision" about EO-1); *id.* at 6 (EO-3 adopted as a result of "the review EO-2 had directed").

[9] Donald J. Trump, @realDonaldTrump, TWITTER, June 5, 2017, 6:29 am ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C."), https://goo.gl/yfihZf; *id.*, June 5, 2017, 6:37 am ("The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version!"), https://goo.gl/WMMnmX.

[10] NBC NEWS, MEET THE PRESS (July 24, 2016), https://goo.gl/RuagfT (transcript of interview between President Trump and Chuck Todd July 24, 2016) ("I actually don't think [EO-2]'s a rollback. In fact, you could say it's an expansion. I'm looking now at territories. People were so upset when I used the word Muslim. Oh, you can't use the word Muslim.").

[11] *Trump Adviser Says New Travel Ban Will Have "Same Basic Policy Outcome,"* FOX NEWS (Feb. 21, 2017), https://goo.gl/Mf2rnm ("Senior White House Policy Adviser Stephen Miller told Fox News' 'First 100 Days' Tuesday that a revised version of President Donald Trump's travel ban would 'have the same basic policy outcome' [as the first]."); Sabrina Siddiqui, *Meet Stephen Miller, Architect of First Travel Ban, Whose Words May Haunt Him*, GUARDIAN (Mar. 15, 2017), https://goo.gl/pQFGdI (" 'Fundamentally', Miller said, 'you're still going to have the same basic policy outcome for the country, but you're going to be responsive to a lot of very technical issues

(continued)

the perception that EO-3, like EO-1 and EO-2, is an expression of anti-Muslim hostility by the United States.

This perception is bolstered by the fact that EO-3 purports to implement indefinitely EO-1 and EO-2, which placed categorical bans on the entry of foreign nationals from certain Muslim-majority countries. The changes to the countries banned under EO-3 do little to alter the perception of the president's orders as a Muslim immigration ban. For instance, the addition of Chad to the list of countries did nothing to dilute that perception, as Chad is itself a Muslim-majority country.[12] The addition of North Korea, from which travel was already heavily restricted, is likely to have little, if any, effect.[13] The restriction on travel by senior Venezuelan officials and their families differs both in scope and in apparent purpose from the bans on substantially all travelers from designated Muslim-majority countries.[14] Indeed, the Government has acknowledged that previous, similar changes between EO-1 and EO-2

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that were brought up by the court, and those will be addressed.' ").

[12] *See, e.g.*, Joshua Keating, *Trump Unveils a New Travel Ban That Includes North Korea, Venezuela, and Chad. Why Chad?*, SLATE (Sept. 24, 2017), https://goo.gl/gftTi8.

[13] *See* Emily Rauhala, *Almost No North Koreans Travel to the U.S., So Why Ban Them?*, WASH. POST (Sept. 25, 2017), https://goo.gl/YjLUN9.

[14] *See* Keating, *supra* note 12 (suggesting that the Venezuela travel restrictions are effectively an extension of existing sanctions against Venezuelan government officials).

were made in response to successful court challenges to EO-1.[15]

B. EO-3 Unnecessarily Undermines the Trust of Key U.S. Allies and Partners.

The success of our military missions often depends on relationships of trust with military and political allies. As the Department of Defense stated in its National Defense Strategy for 2018, "[m]utually beneficial alliances and partnerships are crucial to our strategy, providing a durable asymmetric strategic advantage that no competitor or rival can match."[16] Allies and partners "provide complementary capabilities and forces along with unique perspectives, regional relationships, and information that improve our understanding of the environment and expand our options."[17] Maintaining relationships of trust with our allies and partners facilitates "access to critical regions, supporting a widespread basing and logistics system that underpins the Department's global reach."[18] These relationships are not without challenges, including violations of universal human rights norms by partner governments and their militaries.

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[15] Pet'rs' Br. 4 (issuance of EO-2 was "[r]esponding to the Ninth Circuit's decision" about EO-1); *see also Trump Adviser Says New Travel Ban Will Have "Same Basic Policy Outcome,"* *supra* note 11; Siddiqui, *supra* note 11.

[16] U.S. DEP'T OF DEFENSE, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA: SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE 8 (2018).

[17] *Id.*

[18] *Id.*

Yet EO-3 creates needless obstacles to building these relationships. The perceived anti-Muslim hostility in EO-3 jeopardizes the mission of U.S. troops by antagonizing the governments of Muslim-majority countries, as well as other countries, whose support is important for the U.S. military. EO-3 also jeopardizes U.S. military objectives by alienating Muslim individuals and communities in volatile regions and elsewhere. Losing the support of these individuals, communities, and governments increases the risk of prolonged U.S. military presence in regions with ongoing conflicts or terrorist threats.

1. **EO-3 Unnecessarily Undermines U.S. Relationships with Foreign States.**

The anti-Muslim bias that is seen as underpinning EO-3 harms the United States' relationships with foreign states, whose military cooperation is important to our troops' safety and the success of our military strategies. EO-3 has already compromised the objectives of the U.S. Armed Forces by antagonizing allies and prompting their withdrawal of military support. For instance, after its inclusion in EO-3, Chad withdrew hundreds of troops from Niger, where up to 2,000 of its soldiers were part of a coalition in the fight against Boko Haram.[19] Chad's reaction reportedly had a manifest impact in Niger: "[r]esidents warned that they had already seen an impact from the withdrawal over the past two weeks with a number of attacks being carried out by the

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[19] Alexander Thurston, *America Should Beware a Chadian Military Scorned*, FOREIGN POLICY (Oct. 18, 2017), https://goo.gl/u6fBYu.

militants in Niger's Diffa region."[20] In October 2017, three U.S. service members were killed in Niger while they were providing advice and assistance for counter-terrorism operations to Nigerian security forces.[21] The withdrawal of significant Chadian support from the area only further undermines U.S. strategic objectives in such volatile areas.

As former U.S. national security officials, including Madeleine K. Albright, John B. Bellinger III, James Clapper, Chuck Hagel, John F. Kerry, and Leon E. Panetta, have jointly attested, Chad "has long been one of the United States' most effective counterterrorism partners in the region."[22] Unnecessarily alienating Chad through EO-3 "risks promoting insecurity in parts of Central and West Africa as well as threatening the U.S. government's anti-extremist initiatives and American security,"[23] which in turn affects U.S. military missions.

The effect on U.S. troops and military objectives is not limited to regions directly affected by the ban; EO-3 jeopardizes the United States' relationship with other allies, including those that have predomi-

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[20] Hannah Lawrence, *Chad Pulls Out of Fight Against Boko Haram After Donald Trump's "Muslim Ban" Comes Into Force*, INDEPENDENT (Oct. 14, 2017), https://goo.gl/Y9KB7C.

[21] U.S. DEP'T OF DEFENSE, *U.S. Service Members Killed in Niger, Africom Officials Announce* (Oct. 5, 2017), https://goo.gl/J2mxy3.

[22] J.A. 346, 360.

[23] Donna A. Patterson, *The Travel Ban Against Chad Puts American Security at Risk*, WASH. POST (Feb. 25, 2018), https://goo.gl/7tLUjJ; *see also* Conor Gaffey, *After Trump Travel Ban, Chad Pulls Troops from Boko Haram Fight in Niger*, NEWSWEEK (Oct. 13, 2017), https://goo.gl/PUxjnk.

nantly Muslim populations and thus feel alienated by the United States' apparent anti-Muslim policy. For instance, the previous iterations of the administration's travel ban in EO-1 and EO-2 led Indonesian Foreign Minister Retno Marsudi to express "deep regrets about the policy."[24]

The changes included in EO-3 have not quelled perceptions that the United States endorses a hostile approach to Islam. In December 2017, after EO-3 was issued, Indonesian Cabinet minister, Luhut B. Pandjaitan, wrote that "[m]any Indonesians were dismayed by the Trump administration's hostile rhetoric and intemperate policy stance towards the Muslims of the world. Given that Indonesia is home to the largest number of them, there was a feeling that a wedge was being driven between America and Indonesia."[25]

This antagonizing effect from EO-3 has a negative impact on our strategic mission, through which our military collaborates with Indonesian military forces in furtherance of the current administration's express intent to strengthen its alliance with Indonesia. Throughout different administrations, U.S. policymakers "have recognized that Indonesia ... is a significant actor in Southeast Asia and an important partner in addressing challenges ranging

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[24] Nyshka Chandran, *Trump's Immigration Order Troubles Muslim-Majority Indonesia, Malaysia*, CNBC (Jan. 29, 2017), https://goo.gl/smpDgo.

[25] Luhut B. Pandjaitan, *Why Indonesia Matters in US Ties with South-East Asia*, STRAITS TIMES (Dec. 1, 2017), https://goo.gl/eT4ka5.

from maritime security to Islamic extremism."[26] During his visit to Indonesia in January 2018, U.S. Defense Secretary James Mattis expressed the United States' desire for Indonesia to be a "maritime fulcrum" with a central role in maintaining maritime security in the Asia-Pacific region.[27] In fact, on July 21, 2017, the United States and Indonesian navies conducted joint military exercises.[28] Holding these exercises to "forge cooperation and mutual understanding"[29] in furtherance of U.S. military strategy, however, becomes more difficult when the United States adopts policies that instill "profound concerns over Trump's wider foreign policy" as manifested through "Trump's travel ban."[30]

More generally, signaling a hostile anti-Muslim policy jeopardizes the United States' chances of forging robust alliances with partner and ally states, which harms the chances of mission success. As former senior CIA operations officer Steven Hall warned, significant injury may arise from nationality-based entry restrictions "as a result of the perception in many parts of the world that what Trump is doing is imposing a ban on Muslims,"

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[26] Prashanth Parameswaran, *What's Next for US-Indonesia Defense Relations Under Trump?*, DIPLOMAT (Jan. 24, 2018), https://goo.gl/9qjGQ5.

[27] Robert Burns, *US Says It Wants to Help Indonesia Provide Maritime Security*, ASSOCIATED PRESS (Jan. 23, 2018), https://goo.gl/oemWGM.

[28] Prashanth Parameswaran, *US, Indonesia Conclude Military Exercise*, DIPLOMAT (July 26, 2017), https://goo.gl/z491yw.

[29] *Id.*

[30] *Id.*

because "[t]hat perception won't help, say, when U.S. officials try to convince intelligence agencies in Muslim-majority countries, such as Pakistan or Indonesia, to cooperate with them in the hunt for terrorists."[31] Simply put, "[t]he more the U.S. administration appears to be anti-Muslim, the harder it's going to be to have those cooperative relationships in the counterterrorism realm that are so important."[32]

The discriminatory policy at the heart of EO-3 jeopardizes our relationships not only with Muslim-majority countries but also with countries with more religious diversity. When European countries and other allies, for instance, view our government's policies as hostile to Islam or the Muslims living within their own borders, they face added political and public pressure against maintaining close political and military ties with the United States, because their alignment with the United States is seen as an endorsement of Trump's anti-Muslim sentiments.[33] This added political pressure unnecessarily undermines our relationships with these allies and fuels public opposition to their support for our strategic coalition missions.

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[31] Nahal Toosi, *Trump's Travel Ban Could Endanger U.S. Intelligence Gathering*, POLITICO (Feb. 4, 2017), https://goo.gl/im7Ghe.

[32] *Id.*

[33] *See* Simon Tisdall, *Appease or Oppose? How the World's Nations Are Reacting to Trump*, GUARDIAN (Feb. 2, 2017), https://goo.gl/M8Mefy.

2. EO-3 Discourages Local Individuals in Muslim-Majority Countries from Assisting U.S. Troops.

The perception that EO-3 is a Muslim immigration ban discourages local individuals from partnering with U.S. troops as translators, intelligence resources, or allies in other key supporting roles, to the detriment of U.S. objectives. National security and military experts have explained how local partners support U.S. troops' effectiveness and reduce violence in zones of conflict.[34] EO-3, on the other hand, creates or exacerbates the fear that the United States will not protect individuals in Muslim-majority countries from the retaliation they may suffer for assisting U.S. troops.

Because of the perception that EO-3 targets Muslims, EO-3 interferes with U.S. troops' ability to enlist the assistance of foreign individuals. For instance, although EO-3 no longer includes Iraq among the list of countries whose nationals are almost entirely barred from entering the United States, it still singles out Iraqi nationals as subject to "additional scrutiny" to determine if they pose national security or public safety risks to the United States.[35] This contributes to the perception among Iraqis that EO-3 is anti-Muslim or anti-Iraqi. Such restrictions—coming after the chaos surrounding the hurried implementation of EO-1, when U.S. permanent residents, approved refugees, and other

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[34] Letter from Bipartisan Group of Former Officials to President Donald J. Trump (Mar. 10, 2017), https://goo.gl/3XJbsy.

[35] EO-3, Section 1(g).

visa holders were turned away at the border[36]—portray the United States as ungrateful to those who collaborated with U.S. troops.

3. EO-3 Undermines the Goodwill of the Local Population in Muslim-Majority Countries Where U.S. Troops Are Deployed.

EO-3 also increases hostility among local Muslim communities in countries where U.S. troops are deployed and whose goodwill is essential to the success and security of our military. According to the U.S. Department of Defense, the United States has tens of thousands of service members deployed in conflict zones and states with predominantly Muslim populations. The Department's latest quarterly count of active duty and reserve service members shows that as of September 30, 2017, 15,298 U.S. service members were in Afghanistan, 9,322 in Bahrain, 8,892 in Iraq, 6,567 in Qatar, 4,204 in the United Arab Emirates, and 2,718 in Jordan.[37]

The trust and support of the local communities in which U.S. troops operate are essential to the success of their missions. The U.S. Army Field Manual on counterinsurgency operations emphasizes the importance of building "trusted networks" that include "local allies, community leaders, [and] local

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[36] *See* Kavitha Surana & Molly O'Toole, *For Iraqi Military Interpreters, Trump Travel Ban Chaos Is "Life and Death,"* FOREIGN POLICY (Feb. 6, 2017), https://goo.gl/Huorov.

[37] U.S. DEP'T OF DEFENSE, COUNTS OF ACTIVE DUTY AND RESERVE SERVICE MEMBERS AND APF CIVILIANS (Sept. 30, 2017). These numbers include the number of service members on active duty and reserve service members reported to be deployed in the listed countries.

security forces" in order to displace enemy networks.[38] "Actions that undermine trust or disrupt these [trusted] networks," on the other hand, "even those that provide a short-term military advantage—help the enemy."[39] The perception that EO-3 discriminates against Muslims may undermine U.S. efforts to build and maintain key relationships with Muslim communities within countries where U.S. troops are deployed, which in turn affects the operations of tens of thousands of service members who operate in and interact with these communities.[40] It is for precisely this reason that EO-2 and EO-3 lifted the blanket restrictions on Iraq that had been included in EO-1. Secretary of Defense James Mattis reportedly feared that targeting Iraqis would create animosity toward the United States and compromise cooperation in the fight against ISIS.[41] The removal of Iraq from EO-3, however, did not remove the obstacles U.S.-affiliated Iraqis faced in securing resettlement in the United States. On the contrary, the enhanced vetting procedures for Iraqi refugees that followed the expiration of EO-1's total refugee ban have effectively blocked and delayed

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[38] U.S. DEP'T OF THE ARMY, FIELD MANUAL, FM 3-24.2, TACTICS IN COUNTERINSURGENCY, C-4 to C-5 (Apr. 21, 2009).

[39] U.S. DEP'T OF THE ARMY, FIELD MANUAL, FM 3-24, COUNTERINSURGENCY (Dec. 15, 2006).

[40] *See, e.g.*, Dexter Filkins, *James Mattis, A Warrior in Washington*, NEW YORKER (May 29, 2017), https://goo.gl/hLCjQc.

[41] Glenn Thrush, *Trump's New Travel Ban Blocks Migrants from Six Nations, Sparing Iraq*, N.Y. TIMES (Mar. 7, 2017), https://goo.gl/nv88WC.

resettlement for many Iraqis who worked with the U.S. Armed Forces.[42]

4. Alienating Local Individuals and Communities Can Prolong U.S. Troops' Presence.

Alienating Muslim individuals and local communities through EO-3 can jeopardize the United States' exit strategy and prolong U.S. troop presence in regions with ongoing conflicts or terrorist threats. In a recent statement to Congress on the Posture of the U.S. Central Command ("CENTCOM"), CENTCOM's commander General Joseph L. Votel stated that "CENTCOM's mission is to direct and enable military operations and activities with allies and partners to increase regional security and stability in support of enduring U.S. interests."[43] This mission not only entails "direct[ing] and enabl[ing] military operations with allies and partners,"[44] but also facilitates the United States' exit strategy because it allows local partners to develop their own capabilities and thus decreases the need for our troops' direct participation on the ground. Hence, the United States seeks to prevail against adversaries "'by, with, and through' our partners."[45] In the case of Afghanistan, our troops' "method of working 'by,

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[42] Human Rights First, *Fact Sheet: President Trump's Executive Order on Refugees Harms Our Iraqi Allies* (July 18, 2017), https://goo.gl/qn7P4T.

[43] *Terrorism and Iran, Defense Challenges in the Middle East: Hearing Before the H. Armed Services Comm.*, 115th Cong. 9 (2018) (statement of General Joseph L. Votel, Commander, U.S. Central Command).

[44] *Id.*

[45] *Id.*

with, and through' the [Afghanistan National Defense and Security Forces] ensures we are training Afghan forces to take the lead in combat, enabling them with key assets like intelligence and logistics, and working through the [Afghan government] to find Afghan solutions to Afghan problems."[46]

As one example, U.S. special operations forces (SOFs)—whose role has steadily expanded throughout the United States' counter-ISIS efforts[47]—illustrate the importance of U.S. troops' maintaining strong partnerships with local communities. As Peter Kiernan, a former special operations Marine, explains, a "large majority of special operations involve working with a partner force that creates something we call a 'force multiplier.'"[48] For instance, a "small group of special operators will deploy to an austere environment far away from U.S. forces to equip and train locals to be better and more effective fighters."[49] Doing so allows the small group of American forces to "multiply" their impact by creating effective local forces.[50]

This approach confers key military advantages. Greater reliance on force multipliers allows the

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[46] *Id.*

[47] Linda Robinson, *SOF's Evolving Role: Warfare "By, With, and Through" Local Forces*, RAND BLOG (May 9, 2017), https://goo.gl/xBi7Ec.

[48] Peter James Kiernan, *A Former MARSOC Raider Explains How the Travel Ban Endangers Special Operations Forces*, TASK & PURPOSE (Feb. 2, 2017), https://goo.gl/BxNVm9.

[49] *Id.*

[50] *Id.*

United States to avoid deploying a greater number of conventional forces onto the ground.[51] Furthermore, as noted in General Votel's statement to the House Armed Services Committee, "[b]y building the capacity of regional partners, we enable them to assume a larger share of the responsibility for securing their sovereign spaces."[52] This strategy thus helps give the United States an exit plan from regions in which its troops are deployed.

Nonetheless, the "most essential elements" in building these relationships with local forces that work alongside U.S. troops are "respect and trust."[53] The perceived anti-Muslim agenda behind EO-3 needlessly antagonizes the very people whose trust and support are necessary for our troops to successfully work with and train local forces. Difficulties in recruiting local allies to serve as force multipliers would prolong the presence of U.S. forces, which undermines U.S. military objectives.

C. EO-3's Perceived Anti-Muslim Bias Aids Enemy Recruitment and Propaganda.

The perception that EO-3 is an expression of the anti-Muslim sentiment of the United States increases the threat to U.S. military operations. This perception fuels the clash-of-civilizations narrative utilized by those who recruit for military and terrorist activity against U.S. troops and U.S. allies by claiming that the United States is at war with

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[51] *Id.*

[52] Hearing Before the H. Armed Services Comm., *supra* note 43 (statement of Gen. Joseph L. Votel).

[53] Kiernan, *supra* note 48.

Islam. Terrorists have already exploited the perception that EO-3 is a Muslim ban. Immediately after EO-1 took effect, pro-ISIS social media accounts praised it as a "caller" for recruitment.[54] Indeed, less than a day after President Trump signed EO-1, extremist groups began citing its contents in recruiting messages online.[55] There is little reason to believe that such exploitation will cease.

More generally, policies like EO-3 can harm the United States by providing fodder for terrorist recruitment.[56] It is not hard to see that "labeling all citizens of certain Muslim countries as suspects helps jihadists recruit new members by pitching their struggle as a religious war between Islam and the West."[57] Terrorist organizations recruit fighters, some of whom our forces fight in the theater, by publishing propaganda intended to encourage radicalization.[58] Terrorists understand that the feeling of alienation can encourage an individual to seek a message of welcome. Effective propaganda therefore often encourages movement toward

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[54] *See, e.g.*, Eliza Mackintosh, *Trump Ban Is Boon for ISIS Recruitment, Former Jihadists and Experts Say*, CNN (Jan. 31, 2017), https://goo.gl/4i1tt2; Bethan McKernan, *ISIS Hails Donald Trump's Muslim Immigration Restrictions as a "Blessed Ban,"* INDEPENDENT (Jan. 30, 2017), https://goo.gl/UTP8VT; Joby Warrick, *Jihadist Groups Hail Trump's Travel Ban as a Victory*, WASH. POST (Jan. 29, 2017), https://goo.gl/jQthpg.

[55] Warrick, *supra* note 54.

[56] Sarah Lyons-Padilla & Michele J. Gelfand, *The Social Scientific Case Against a Muslim Ban*, N.Y. TIMES (Feb. 18, 2017), https://goo.gl/B78hn0.

[57] Kiernan, *supra* note 48.

[58] Lyons-Padilla & Gelfand, *supra* note 56.

extremism by including the message that individuals can find a home in terrorist organizations, while they would be rejected by the United States,[59] specifically relying on the claim that the United States is anti-Islam,[60] a perception likely furthered by EO-3.

As highlighted in connection with refugee admissions by former Deputy Director of Intelligence and former Acting Director of the CIA John McLaughlin, sending a message that "you are welcome here" is one that "ISIS would not like."[61] Rather, "ISIS would like you to think you are welcome only in their caliphate."[62] EO-3 essentially turns on its head years of bipartisan, expert policy advice that the United States must avoid feeding the narratives that underpin terrorist propaganda.[63] As former Homeland Security Secretary Michael Chertoff stated in 2015: "You don't want to play into the narrative of the bad guy. That's giving propaganda to the enemy."[64]

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[59] *See id.*

[60] *Id.*

[61] *Outside Views on the Strategy for Iraq and Syria: Hearing Before the H. Armed Services Comm.*, 144th Cong. 13 (2015).

[62] *Id.*

[63] *See, e.g.*, Letter from Former National Security Leaders to U.S. Congress (Dec. 1, 2015), https://goo.gl/km6hzt; Michael Hayden & James Stavridis, *U.S. Must Lead on Refugee Crisis*, MIAMI HERALD (July 8, 2016), https://goo.gl/C4gkzB; Jason Riley, *Mistrusting Obama on ISIS—and Refugees*, WALL ST. J. (Nov. 18, 2015), https://goo.gl/2JsS3Y.

[64] Riley, *supra* note 63.

For precisely these reasons, veterans and intelligence officials promptly and publicly spoke out against EO-1.[65] Former deputy chief of the CIA Operations Directorate Robert Richer cautioned that EO-1 was "a win for jihadists and other anti-U.S. forces," because it "fuels the belief out there that Americans are anti-Islam."[66] Former CIA director general Michael Hayden echoed this warning, stating:

> what we're doing now has probably made us less safe today ... we are now living the worst jihadist narrative possible, that there is undying enmity between Islam and the West. Muslims out there who were not part of the jihadist movement are now being shown that the story they're being told by the jihadists—they hate us; they're our enemy—that's being acted out by the American government.[67]

Indeed, the Department of Defense, pursuant to its various missions, is directly engaged in efforts to fight enemy propaganda. The department employs

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[65] *See, e.g.*, *Immigration Ban Misses Greatest Threat, Counterterrorism Expert Says*, PBS NEWSHOUR (Jan. 31, 2017), goo.gl/SjTYBu; Letter from Over 100 Former Officials to Secretary Kelly et al. (Jan. 30, 2017), https://goo.gl/7J3w3y; Mackintosh, *supra* note 4.

[66] Warrick, *supra* note 54.

[67] *National Security Council Changes Are Very Significant, Hayden Says*, NAT'L PUB. RADIO (Jan. 30, 2017), https://goo.gl/rJYNEN.

Military Information Support to Operations, or MISO, which is a "traditional military activity," as part of Operation Inherent Resolve.[68] MISO involves countering enemy messaging and propaganda.[69] Coalition forces, for example, often target ISIS propaganda officials.[70]

The Proclamation sends the precise message the U.S. military strategy cannot afford, feeding into the terrorist narrative and recruitment propaganda even as our military and those of our allies face enemies who recruit on the basis of this perception. Welcoming travelers and immigrants from Muslim-majority countries equally with all travelers, by contrast, exposes the lies of terrorists spreading such a warped vision of the United States.

II. EO-3 Endangers Deployed U.S. Service Members by Creating the Perception that the United States Is Contravening International Norms and Human Rights Ideals.

Ideals and norms of nondiscrimination have long been enshrined in our Constitution as well as in human rights treaties to which the United States is a party. When the United States is viewed as breaking with its own norms and fundamental international principles, as has been the case with EO-3, enemies of the United States are encouraged to do the same. Further, the perception that the United States is

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[68] Karen Parrish, *Centcom Counters ISIL Propaganda*, DoD NEWS (July 6, 2016), https://goo.gl/zc1rPE.

[69] *See id.*

[70] *See* U.S. Dep't of Defense, *Coalition Announces Death of ISIS Leaders* (July 27, 2017), https://goo.gl/nhPLgh.

unwilling to abide by the international norms it espouses fuels recruitment of individuals by U.S. enemies.

A. U.S. Compliance with International Norms and Human Rights Ideals Enhances the Legitimacy of U.S. Action in the World, Which Serves Our National Security Interests.

As a nation, we are strongest when our actions match our ideals. The United States ratified the International Covenant on Civil and Political Rights[71] and International Convention on the Elimination of All Forms of Racial Discrimination[72] as reflections of our own Constitution and laws, which "guarantee all persons equal protection of the law and provide extensive protections against discrimination."[73] By adhering to the rule of law, including equal treatment without regard to religion or national origin, our nation gains respect and legitimacy abroad and is thereby made more secure.

Over 30 former U.S. government and national security officials recognized this point, writing in their March 2017 letter to Secretary of Defense

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[71] International Covenant on Civil and Political Rights, Dec. 16, 1966, Senate Treaty No. 95-20, 999 U.N.T.S. 171.

[72] International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, Senate Treaty No. 95-18, 660 U.N.T.S. 195.

[73] U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, § II(1), 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992), *see also* U.S. Reservations, Declarations, and Understandings, International Covenant on the Elimination of All Forms of Racial Discrimination, § I(2), 140 Cong. Rec. S7634-02 (daily ed., June 24, 1994).

James Mattis: "In any counterterrorism or counter-insurgency campaign, public confidence and legitimacy are critical to strategic success."[74] The Joint Chiefs of Staff have also stated, in an official publication, that legitimacy "can be a decisive factor in operations" and that "[t]he purpose of legitimacy is to maintain legal and moral authority in the conduct of operations."[75] This legitimacy "is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences," which extend to "nations and organizations around the world."[76]

By fueling the perception that we are breaking international norms and enacting policy that does not match our own ideals, EO-3 damages U.S. legitimacy. This perception of hypocrisy poses a risk to our national security. Targeting largely Muslim-majority countries with blanket visa bans suggests that the United States engages in double-speak, advocating values of equality and non-discrimination while contravening these same values itself.[77]

As stated by retired U.S. Army General David Petraeus:

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[74] Letter from Former National Security Officials to James N. Mattis, Secretary of Defense (Mar. 10, 2017), https://goo.gl/RzrymT.

[75] U.S. DEP'T OF DEFENSE, JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS A–4 (2017).

[76] *Id.*

[77] *See, e.g.*, Halim Shebaya, *Trump's Hypocrisy, from Jerusalem to Tehran*, AL JAZEERA (Jan. 5, 2018), https://goo.gl/Ts6Kta.

> When Western politicians propose blanket discrimination against Islam they bolster the terrorists' propaganda ... At the same time, such statements directly undermine our ability to defeat Islamist extremists by alienating and undermining the allies whose help we most need to win this fight: namely, Muslims. ... I fear that those who demonize and denigrate Islam make it more likely that it will be our own men and women who ultimately have to shoulder more of this fight—at greater cost in dollars and lives.[78]

Ultimately, EO-3's derogation from human rights norms and ideals, which the United States itself promotes, undermines the very national security EO-3 purports to enhance.

B. U.S. Defiance of the Rule of Law and International Norms Encourages Other Actors to Violate those Norms.

On the heels of EO-1 and EO-2, EO-3's bans on entry of nationals from Muslim-majority countries creates a strong perception of nation-specific religious discrimination contravening the international norms enshrined in both U.S. law and international treaties.[79] In conjunction with the anti-

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[78] David Petraeus, *Anti-Muslim Bigotry Aids Islamist Terrorists*, WASH. POST (May 13, 2016), https://goo.gl/Pgsieh.

[79] *See, e.g.*, U.S. CONST. amends. I, XIV; International Covenant on Civil and Political Rights, *supra* note 71, arts. 4, *(continued)*

Muslim rhetoric preceding and surrounding EO-3's predecessor bans, EO-3 creates the impression that the United States defies international norms at the whim and personal preference of its leaders. By doing so, it encourages such defiance by others. When the United States is perceived as violating domestic and international law, other states and actors can be emboldened to follow suit, declining to treat U.S. service members with whom they may be in conflict in accordance with international norms.

U.N. Secretary-General António Guterres called the first iteration of President Trump's travel ban a set of measures that "spread anxiety and anger" and "violate our basic principles."[80] Five U.N. Special Rapporteurs further stated that the "order is clearly discriminatory based on one's nationality and leads to increased stigmatization of Muslim communities."[81] British Foreign Secretary Boris Johnson responded to EO-1 by stating it is "divisive and wrong to stigmatise because of nationality."[82] German Chancellor Angela Merkel added that the war on terrorism "does not in any way justify putting groups of certain people under general suspicion—in

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26; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 72, pmbl., arts. 2, 4, 1(3).

[80] Somini Sengupta, *U.N. Leader Says Trump Visa Bans "Violate Our Basic Principles,"* N.Y. TIMES (Feb. 1, 2017), https://goo.gl/RNpqx7.

[81] *US Travel Ban a "Significant Setback" for Those Needing International Protection—UN Rights Experts*, UN NEWS (Feb. 1, 2017), https://goo.gl/A7YE7F.

[82] *Boris Johnson: US Immigration Order Divisive and Wrong*, BBC (Jan. 29, 2017), https://goo.gl/3oTCzT.

this case people of Muslim belief or of a certain origin."[83]

Such perceived disregard for international norms by the United States encourages defiance of international norms by other states and non-state actors, making America less safe. In response to President Trump's initial travel ban, Iran—whose role in regional armed conflict can affect the safety of U.S. troops deployed in countries like Yemen and Syria[84]—announced a reciprocal measure against Americans.[85] Iraq, a country in which the United States has significant oil operations, considered such

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[83] Barney Henderson et al., *Barack Obama Hits Out at Donald Trump, Warning 'American values' Are at Stake*, TELEGRAPH (Jan. 31, 2017), https://goo.gl/XD2Vmi.

[84] *See* Kareem Fahim & Karen DeYoung, *Saudis Accuse Iran of Possible "Act of War" as Regional Tensions Rise*, WASH. POST (Nov. 6, 2017), https://goo.gl/P91opb; Ralph Peters, *Tensions Between Iran and Saudis Could Draw US into Another War*, N.Y. POST (Nov. 13, 2017), https://goo.gl/DW13ga; Thomas Gibbons-Neff, *U.S. Troops Are on the Ground in Yemen for Offensive Against Al-Qaeda Militants*, WASH. POST (Aug. 4, 2017), https://goo.gl/XmY3ik.

[85] *See* Parisa Hafezi et al., *Iran Says to Ban U.S. Visitors in Retaliation to Trump Move*, REUTERS (Jan. 28, 2017), https://goo.gl/wxP93Z (quoting Iranian Foreign Ministry's statement that "[w]hile respecting the American people and distinguishing between them and the hostile policies of the U.S. government, Iran will implement the principle of reciprocity until the offensive U.S. limitations against Iranian nationals are lifted"); *see also* Patrick Wintour, *UN Says Trump's Revised Travel Ban Will Worsen Plight of Refugees*, GUARDIAN (Mar. 7, 2017), https://goo.gl/yiL8Oc (noting Iran's "retaliatory decision" remained in place after EO-2).

a reciprocal measure as well,[86] and a Qatari military official indicated that U.S.-Iraqi cooperation in the battle to liberate Mosul was at risk.[87] Removing Iraq from EO-2's and EO-3's list of countries has not eliminated such risks, as it could be added back without notice, and its nationals continue to be subject to additional scrutiny, hindering the resettlement of U.S.-affiliated Iraqis in the United States.[88] Chad, for example, learned "with astonishment" about its inclusion in EO-3 and stated that the ban "seriously undermines" U.S.-Chadian relations and the two states' efforts to fight terrorism.[89] Among non-state actors such as ISIS and Al-Qaeda, perceived U.S. hypocrisy, a perception furthered by EO-3 and its predecessors, is a strong recruitment tool for terrorist acts,[90] and risks setting back U.S. military operations against them.

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[86] *See* Rebecca Savransky, *Iraq Parliament Approves "Reciprocity Measure" in Trump Immigration Ban's Wake*, THE HILL (Jan. 30, 2017), https://goo.gl/vbty5e; *but see* Sam Wilkin & Khalid Al Ansary, *Iraq's Oil Production Unscathed for Now by Trump Travel Ban*, BLOOMBERG (Feb. 2, 2017), https://goo.gl/6M9tGk.

[87] *Allies Warn Trump's Travel Ban Will Be "Lifeline" for ISIS*, CBS NEWS (Jan. 31, 2017), https://goo.gl/TP3PFo.

[88] *See* Human Rights First, *Fact Sheet*, *supra* note 42.

[89] Krishnadev Calamur, *Why Was Chad Included in the New Travel Ban?*, ATLANTIC (Sep. 26, 2017), https://goo.gl/WHk5R8; Gaffey, *supra* note 23.

[90] *See* McKernan, *supra* note 54 ("Isis-friendly channels on the Telegram messaging service described the ban as 'blessed', echoing how the US 2003 invasion of Iraq was called a 'blessed invasion' for reinvigorating anti-US sentiment in the region"); *see also* Warrick, *supra* note 54.

CONCLUSION

EO-3 fails to advance, and in fact undermines, its stated goal of enhancing the national security of the United States. Amici curiae respectfully submit that the judgment of the court below should be affirmed.

Respectfully submitted,

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